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IN THE

Supreme Court of the United States

DANIEL BENITEZ,

Petitioner,

v.

JOHN MATA, INTERIM FIELD OFFICE DIRECTOR, MIAMI, BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE AMERICAN BAR ASSOCIATION *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE AMERICAN BAR ASSOCIATION *AMICUS CURIAE* IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST [1]

The American Bar Association ("ABA") is a voluntary, national membership organization of the legal profession. Its more than 400,000 members, from every state and territory

[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus* or its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have filed letters consenting to the filing of this brief with the Clerk of this Court. Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

and the District of Columbia, include prosecutors, public defenders, private lawyers, legislators, law professors, law enforcement and corrections personnel, law students and even non-lawyer associates in allied fields.

The ABA has long been committed to protecting the constitutional and statutory rights of noncitizen detainees. For example, the ABA Commission on Immigration Policy, Practice and Pro Bono has assisted in organizing numerous *pro bono* immigration representation efforts and trained volunteer attorneys from the private bar to counsel immigrants in removal proceedings and to represent them on appeal. In August 2002, the ABA House of Delegates adopted a policy that "urges protection of the constitutional and statutory rights of immigration detainees . . . by [p]romptly charging detainees and releasing detainees when charges are not brought or removal orders are not effectuated within a constitutionally permissible time period." The policy also calls for the provision of prompt custody hearings for immigration detainees before immigration judges, accompanied by meaningful administrative review and judicial oversight.

The ABA has also been particularly concerned with ensuring the provision of the protections of the Due Process Clause to people threatened with criminal or administrative sanctions. Thus, for example, the ABA has recently considered such matters as the due process rights of defendants tried by military commissions,[2] including the right to counsel and the right to confront witnesses, and the right of noncitizen detainees to public deportation hearings with access to counsel.[3] This case raises questions of similar and substantial

[2] ABA *Recommendation 8C* (adopted Feb. 2002), available at <*http://www.abanet.org/leadership/2002_dailyjournal.pdf*>.

[3] ABA, *2001 Legislative and Governmental Priorities: Immigration* (policy adopted Feb. 2001) (Opposing the Use of Secret Evidence in Immigration Proceedings and Opposing Involuntary Transfer of Detained Immigrants and Asylum Seekers that Impede Representation), available at <*http://www.abanet.org/poladv/priorities/immigration/policies.html*>.

importance regarding the application of the Due Process Clause to inadmissible noncitizens whom the government seeks to subject to indefinite detention. Accordingly, the ABA appears as *amicus curiae* in this proceeding.

PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT

Indefinite executive detention poses one of the gravest dangers to a society that has historically valued the principles of due process and the rule of law. This Court must now decide whether the petitioner may be subjected to indefinite administrative detention, regardless of how long he has lived in the United States, or how deep his ties are to this country, based on the determination that he is "inadmissible" under the immigration statutes.

The government's contention that petitioner's potentially lifelong confinement poses "no due process problem," Brief for the Respondent on Petition for Writ of Certiorari at 16, rests on its interpretation of a single decision of this Court over a half-century ago, in a case that posed distinct national security concerns. In *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), the Court upheld a noncitizen's indefinite detention at Ellis Island when no country would accept him following his exclusion without a hearing upon returning from an unauthorized nineteen-month trip behind the Iron Curtain. Under the government's interpretation of *Mezei*, however, any noncitizen denied admission under the immigration laws necessarily lacks "*any* [constitutional] right against continued immigration custody, even if such detention is indefinite and prolonged." Brief for Appellee to the Eleventh Circuit at 19-20 (emphasis added); *id.* at 22 (under *Mezei*, an inadmissible noncitizen has "no liberty interest" in remaining free of potentially lifelong confinement).

In claiming that *Mezei* is dispositive here, the government fails to apply the reasoning and force of this Court's recent

decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001). In *Zadvydas*, the Court certainly noted that the long-standing distinction between noncitizens who have entered the United States and those who have not "made all the difference" in *Mezei*. 533 U.S. at 693. *Zadvydas*, however, qualified and limited *Mezei* by analytically separating a noncitizen's due process right to be free from indefinite administrative detention from his right to live in the United States under the immigration statutes. *Id.* at 695-96; *see also id.* at 703 (Scalia, J., dissenting) (*Zadvydas* petitioners claimed their right to be free from indefinite detention though they conceded that they "had no legal right to be here"); *id.* at 716 (Kennedy, J., dissenting) ("The majority's rule is not limited to aliens once lawfully admitted."). None of the cornerstone due process protections against indefinite detention relied on by the *Zadvydas* Court turn on a person's noncitizen status, let alone on statutory distinctions between the former immigration law categories of "deportation" and "exclusion" (now, together, known as "removal"). *Id.* at 690-92. Thus, although the petitioners in *Zadvydas* had lost the right to remain in the United States, their indefinite administrative detention pending removal under 8 U.S.C. § 1231(a)(6) raised such "a serious constitutional problem," *id.* at 690, that the Court imposed a reasonable time limit on this detention. *Id.* at 701. The petitioner in this matter is detained under the same overly broad statute which suffers from substantially the same procedural shortcomings. Under the framework set forth in *Zadvydas*, petitioner's "inadmissibility" for immigration purposes does not, then, place his continued detention entirely beyond the reach of the Due Process Clause.

As the government essentially acknowledges, this Court has never explicitly interpreted *Mezei* to sanction the indefinite detention of an inadmissible noncitizen pending removal from the United States. Brief for Appellee to the

Eleventh Circuit at 40.[4] To the contrary, the Court has consistently cited *Mezei* for the more limited—and here undisputed—propositions that Congress possesses broad powers to establish the criteria for admission to the country, *see, e.g., Fiallo v. Bell*, 430 U.S. 787, 792 (1977), and that noncitizens facing deportation have traditionally been entitled to greater constitutional protections than those facing exclusion. *See, e.g., Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 175 (1993); *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958).

For the following reasons, *Mezei* should not now be extended beyond its specific factual and historical context to sanction the petitioner's indefinite administrative detention.

1. *Mezei* failed to consider a half-century of jurisprudence in stating that for noncitizens deemed inadmissible by the United States, due process is limited to whatever Congress deems it to be. *Mezei*, 345 U.S. at 212. After this Court's decision in *Yamataya v. Fisher*, 189 U.S. 86 (1903), first established that noncitizens facing removal were entitled to due process, courts required some due process protections even in exclusion cases. Indeed, the distinction between deportation and exclusion had never been the absolute, bright-line rule described in *Mezei* or in *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), another national security exclusion case decided three years earlier. *Mezei*, moreover, failed to consider the right of noncitizens to be free from punishment without the protections of due process, as well as the need to impose limits on administrative detention pending removal from the country. As Justice Jackson pointed out in his powerful dissent, joined by Justice

[4] When a constitutional challenge to the detention of unadmitted noncitizens was last before this Court, the case was instead decided on nonconstitutional grounds. *Jean v. Nelson*, 472 U.S. 846 (1985) (equal protection challenge to policy of detention without parole for noncitizens seeking admission that discriminated on basis of race and national origin).

Frankfurter, *Mezei*'s overly broad sweep contravened hundreds of years of Anglo-American jurisprudence protecting against indefinite executive detention. 345 U.S. at 218-19 (Jackson, J., dissenting).

2. Although the Court did not need to address this issue in *Zadvydas*, 533 U.S. at 694, its analysis there makes clear that *Mezei* has been eroded by the Court's subsequent substantive and procedural due process jurisprudence. With respect to substantive due process, this Court has increasingly recognized the punitive consequences of indefinite regulatory detention. It has accordingly authorized such detention only in limited circumstances pursuant to a carefully defined scheme. As to procedural due process, this Court has abandoned the notion that any infringement on an individual's constitutional interests requires all the protections of a criminal trial, in favor of a flexible balancing test which evaluates the procedures provided by the government in light of the particular circumstances. The test considers the strengths of both the individual's liberty interest and the government's interest in efficient procedures. In the immigration context, this jurisprudence has prompted the Court to reject the notion that the so-called "entry fiction" is of constitutional significance. *E.g.*, *Landon v. Plasencia*, 459 U.S. 21 (1982). The flexibility of procedural due process now permits a conclusion that, while individuals standing at the border may possess a protected liberty interest in avoiding indefinite imprisonment, their status as inadmissible noncitizens, along with the government's interest in national security in a given case, are relevant to determining precisely what process is due.

3. *Mezei*, however, need not be overruled in order for petitioner to prevail, but only limited to its historical and factual context. *Mezei*, properly understood, demonstrates that the political branches possess broad powers in regulating immigration to the country, particularly in the specific instance of a national security case (a situation not presented here), and not that a noncitizen's potentially lifelong administrative detention remains outside the Due Process Clause because he has been formally deemed inadmissible, even if he has lived here for many years.

ARGUMENT

I. EVEN WHEN IT WAS DECIDED, *MEZEI* RESTED ON WEAK AND HISTORICALLY UNFOUNDED REASONING

The *Mezei* Court suggested that its decision fell within a long tradition of limiting constitutional rights to those noncitizens who had "passed through our gates" and entered the country. 345 U.S. at 212. But, the history of immigration law was far more nuanced than this and, if anything, *Mezei*, and its predecessor *Knauff*, *supra*,[5] represented departures from past principles rather than the culmination of a jurisprudential evolution. Specifically, *Knauff* and *Mezei* overstated the limits on the judiciary's role in ensuring at least some due process protection even in exclusion proceedings. Before *Mezei*, the Supreme Court had not held that the political branches' power to regulate immigration included the power to detain even inadmissible noncitizens indefinitely, and lower courts had consistently limited the length of time excludable noncitizens could be detained pending their removal. Thus, *Mezei* was incorrect to the extent that it concluded that inadmissible noncitizens remain outside the basic protections secured by the Due Process Clause.

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[5] In *Knauff*, the Court excluded the noncitizen wife of an American serviceman based on secret evidence and without a hearing. In reaching this result, the Court stated that because she had no right to admission, she also lacked the right to a hearing as a matter of due process. 338 U.S. at 543-44.

A. Before *Mezei*, Noncitizens Seeking Admission Were Entitled to Some Due Process.

Prior to *Knauff* and *Mezei*, the distinction between noncitizens who had entered the United States and those who remained outside it had not had been elevated to a bright-line constitutional rule, and "entry" had never been completely determinative of the fact or extent of protection under the Due Process Clause. For all noncitizens subject to removal, the government's "power to lay down general rules," even if "plenary," was not understood to include the "power to be arbitrary or to authorize administrative officials to be arbitrary," or to foreclose the federal courts from ensuring observance of the basic "constitutional guarantee of due process." *See* Henry M. Hart, "The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic," 66 *Harv. L. Rev.* 1362, 1390-91 (1953).

In *Yamataya*, *supra*, this Court first expressly recognized that noncitizens facing removal were entitled to due process, including notice of the charges against them and an opportunity to be heard. 189 U.S. at 100-01. There, the petitioner, who had been in the United States for merely four days, had never been lawfully admitted to the country and had "entered" subject to conditions that could be revoked. *Id.* at 87. The government claimed she could be removed because she was likely to become a public charge. *Id.* Acknowledging the finality of executive or administrative officers' factual findings as to admissibility, this Court also stated that such officers could *never* "disregard the fundamental principles that inhere in due process of law" with respect to their power "*to exclude* or expel" noncitizens. *Id.* at 100 (internal quotation marks omitted) (emphasis added).

Shortly after *Yamataya*, this Court began construing statutes in exclusion cases against the background of basic due process norms. In *Chin Yow v. United States*, 208 U.S. 8 (1908), it stated that provisions intended to ensure the

"finality" of fact-finding by administrative officials in exclusion proceedings were based on "the presupposition that the decision was after a hearing in good faith." *Id.* at 12; *see also* Kenneth C. Davis, *Administrative Law* § 237, at 828 (1951) (*Chin Yow* opened the door to "expanding judicial review" of exclusion hearings). A leading commentator at the time described the influence of *Yamataya* and *Chin Yow*, concluding that, together, they demonstrated that the Due Process Clause applied in both exclusion and deportation cases. Clement L. Bouvé, *A Treatise on the Laws Governing the Exclusion and Expulsion of Aliens in the United States* 139-41 (1912). During the decades to follow, courts consistently construed provisions governing the exclusion of noncitizens to require a fair hearing and to prevent arbitrary action, not only in cases involving claims of United States citizenship[6] but in various other challenges to exclusion orders as well.[7]

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[6] *E.g.*, *Kwock Jan Fat v. White*, 253 U.S. 454, 459 (1920) (granting relief because procedures cannot be "unfair and inconsistent with the fundamental principles of justice embraced within the conception of due process of law"); *Carmichael v. Wong Choon Ock*, 119 F.2d 173, 174 (9th Cir. 1941) (granting relief where "action of the immigration authorities was manifestly unfair"); *Fong Tan Jew ex rel. Chin Hong Fun v. Tillinghast*, 24 F.2d 632, 636 (1st Cir. 1928) (granting relief where record shows immigration officials' "fail[ed] to exercise their great power" in accordance with "'traditions and principles of free government'") (quoting *Kwock Jan Fat*, 253 U.S. at 464); *Go Lun v. Nagle*, 22 F.2d 246, 248 (9th Cir. 1927) (granting relief because "'[t]he mind revolts against [unfair hearings when] dealing with vital human rights'") (quoting *Johnson v. Damon ex rel. Leung Fook Yung*, 16 F.2d 65, 66 (1st Cir. 1926)); *United States v. Chin Len*, 187 F. 544, 550 (2d Cir. 1911) (granting relief because hearings were not "full, fair, and unbiased"); Gerald L. Neuman, "The Constitutional Requirement of 'Some Evidence,'" 25 *San Diego L. Rev.* 631, 641 (1988) (citing cases); *see also Quon Quon Poy v. Johnson*, 273 U.S. 352, 356 (1927) (affirming exclusion order where petitioner received fair hearing and there was "painstaking and impartial effort" to ascertain merits of his citizenship claim); *Tang Tun v. Edsell*, 223 U.S. 673, 681-82 (1912) (review of executive determination to ensure its authority was

Thus, there was no firm support for *Mezei*'s sweeping dictum upon which the government now relies so heavily—that

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"fairly exercised"); *Jung Sam v. Haff*, 116 F.2d 384, 387 (9th Cir. 1940) (petitioner entitled to "a fair hearing").

[7] *See, e.g., Gegiow v. Uhl*, 239 U.S. 3, 9-10 (1915) (reversing decision excluding noncitizens on ground they "were likely to become a public charge" because administrative official exceeded scope of his authority, resulting in "a decision without a fair hearing"); *United States ex rel. Jelic v. District Director of Immigration and Naturalization*, 106 F.2d 14, 19-20 (2d Cir. 1939) (reversing exclusion order based on, *inter alia*, lack of proper visa and false statements due to absence of "fair hearing" and "fair dealing"); *United States ex rel. Schachter v. Curran*, 4 F.2d 356, 358 (3rd Cir. 1925) (reversing exclusion order based on failure to establish sufficient residence in South America to entitle noncitizen to admission under immigration quota; stating that noncitizen "has rights . . . of which he cannot be deprived without due process of law and for the enforcement of which he may invoke judicial interference" and that administrative officials "have no power to dispense with the usual means of ascertaining the truth") (internal quotation marks omitted); *see also Chieng Ah Sui v. McCoy*, 239 U.S. 139, 142-44 (1915) (reviewing due process challenge to denial of admission of petitioner's minor sons under certificate of re-entry but denying relief on merits because petitioner had "abundant opportunity" for hearing and consideration of testimony); *Brownlow v. Miers*, 28 F.2d 653, 657-58 (5th Cir. 1928) (noncitizen excluded as stowaway and person likely to become a public charge not entitled to Sixth Amendment right to counsel but still entitled to "fair" hearing and "rights and privileges dictated by common justice"); *United States v. Petkos*, 214 F. 978, 980 (1st Cir. 1914) (noncitizen excluded on public health ground has right to "fair hearing [based] on lawful evidence"); *United States ex rel. Basile v. Curran*, 298 F. 951, 952 (S.D.N.Y. 1924) (Hand, J.) (reversing exclusion of noncitizen based on unfair hearing where administrative officials "dispense[d] with the usual means of ascertaining the truth" and failed "to proceed rationally"); *Ex parte Joyce*, 212 F. 282, 284-85 (D. Mass. 1913) (exclusion of noncitizen on public health ground would be "unfair . . . and ought not stand" if decision is based solely on medical report without consideration of other evidence of noncitizen's mental condition); "Developments in the Law—Immigration and Nationality," 66 *Harv. L. Rev.* 643, 671 (1953) [hereinafter "Developments in the Law"]; Hart, *supra*, at 1390-91 (in the half-century before *Mezei*, basic notions of due process and the rule of law "grew and flourished").

those "on the threshold of initial entry" possess only the due process "authorized by Congress," 345 U.S. at 212. For that proposition, the *Mezei* Court itself cited only one case other than *Knauff*—the Court's 1892 decision in *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892). *Nishimura Ekiu*, which predated *Yamataya* by over a decade, upheld the particular administrative scheme then provided by Congress to determine the admission of noncitizens, 142 U.S. at 664, but was eroded by subsequent decisions applying due process principles in the exclusion context.[8]

Knauff, likewise, fails to buttress the government's expansive interpretation of *Mezei*. Other than *Nishimura Ekiu*, *supra*, *Knauff* cited only three cases, all involving the deportation of noncitizens—*Yamataya*, *supra*; *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); and *Ludecke v. Watkins*, 335 U.S. 160 (1948). *See Knauff*, 338 U.S. at 543; *see also id.* at 544 (citing only *Nishimura Ekiu* and *Ludecke* in support of same proposition). *Yamataya*, as noted, explicitly recognized that a noncitizen facing removal was entitled to due process (a principle later extended to exclusion cases); the cited passage of *Fong Yue Ting*, another pre-*Yamataya* decision, merely established that the power to exclude and to expel noncitizens rested upon the same general foundation, *see* 149 U.S. at 713-14; and *Ludecke* involved the deportation of an "enemy alien" under the Alien Enemies Act of 1798, 1 Stat. 577, a context perhaps

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[8] Even in the earlier cases like *Nishimura Ekiu*, the Court had indicated its resolve to assure the lawful, constitutional application of immigration statutes to the exclusion of noncitizens. *E.g., Nishimura Ekiu*, 142 U.S. at 660 (judicial review of exclusion of noncitizens to ensure "the restraint is lawful"); *see also Yung Yo v. United States*, 185 U.S. 296, 305 (1902) (courts will review decision to exclude noncitizen where "required by the Constitution . . . to intervene"). However, in a manner "typical of the period," the Court in those very first cases was more focused on the placement of power in the appropriate branch than on procedural issues surrounding its exercise. Neuman, *supra*, at 637-38.

sufficiently related to a national security exclusion case like Knauff's or Mezei's, but not to removal proceedings generally. Indeed, even *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) ("The Chinese Exclusion Case"), which first described the political branches' "plenary power" over immigration, did not contemplate the extreme statement of the law which the government derives from *Mezei* and *Knauff*. 130 U.S. at 604 (federal power over immigration is limited "only by the constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations"), *quoted in Zadvydas*, 533 U.S. at 695; *see also id.* (political branches' power over immigration "is subject to important constitutional limitations").

In short, *Mezei* does not support the sweeping proposition the government asserts, that unadmitted noncitizens are necessarily beyond all due process protections. Indeed, leading commentators at the time criticized *Mezei*'s unprecedented sweep. Professor Hart, for example, asserted that *Mezei*, along with *Knauff*, had ignored "thousands" of lower court cases, including exclusion cases, which had required basic due process guarantees. Hart, *supra* at 1390-91.[9] And, only the year after *Mezei*, this Court again

[9] *See also* Developments in the Law, *supra* at 675 (stating, pre-*Mezei*, that *Knauff* "ignore[d] judicial developments of the last fifty years" and that "implicit in this history of judicial intervention [was] a theory of due process, of judicial supervision of administrative action arising out of our pervading constitutional concept of a rule of law"); Case Notes, 27 *S. Cal. L. Rev.* 315, 321 (1954) ("If the decision in the *Mezei* case is based on the ground that there exists supreme sovereign authority over aliens excluded from the United States, unrestricted by any limitations whatsoever, it clearly transcends fundamental notions of justice and human decency."); Comments, 34 *B. Univ. L. Rev.* 85, 88 (1954) (*Knauff* and *Mezei* "reversed th[e] trend" of granting increasing due process rights to noncitizens seeking admission). More contemporary commentators have concurred with Hart's basic critique of *Knauff* and *Mezei*. *E.g.*, T. Alexander Aleinikoff, "Aliens, Due Process and 'Community Ties': A Response to

confirmed that despite Congress' broad power to formulate immigration "[p]olicies pertaining to the entry of aliens and their right to remain here," the "Executive Branch of the Government must respect the procedural safeguards of due process" in its "enforcement of those policies." *Galvan v. Press*, 347 U.S. 522, 531 (1954). Nonetheless, in light of the government's argument here, the Court is now called upon to clarify that, while a noncitizen's formal status as an entrant to this country may be relevant to determining his appropriate treatment, it does not completely deprive him of the protections of the Due Process Clause.

B. *Mezei* Wrongly Equated the Power to Exclude with the Power To Detain Indefinitely.

In determining that the petitioner's potentially lifelong administrative detention did not deprive him of any constitutional right, *Mezei* conflated Congress' broad power to determine admissibility with the distinct power to detain those found to be inadmissible beyond the temporary period necessary to effectuate their removal. Specifically, the Court noted that temporary arrangements authorizing a noncitizen's transfer from ship to shore "bestowed no additional rights" and did not "affect[ ] an alien's status." 345 U.S. at 215. Here, it relied on precedents addressing the "entry fiction"[10]—the notion that the fact of physical presence in the

Martin," 44 *U. Pitt. L. Rev.* 237, 237 (1983) ("Occasionally [as in *Knauff* and *Mezei*], the Supreme Court makes a statement about the Constitution that simply cannot be true."); David A. Martin, "Due Process and Membership in the National Community: Political Asylum and Beyond," 44 *U. Pitt. L. Rev.* 165, 174-75 (1983) (until *Knauff*, federal courts attempted to ensure immigration officers acted in accordance with basic ideas of fairness and this Court "unmistakably asserted an independent judicial role in evaluating the adequacy of the hearing").

[10] The "entry fiction" originally derived from late nineteenth and early twentieth century statutes permitting immigration inspectors to order the temporary transfer of a noncitizen from a vessel to shore for inspection

United States did not necessarily constitute an "entry," and that such persons legally remained at the border for purposes of admission. 345 U.S. at 212.[11] *Mezei*, however, stretched

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because of the practical difficulties associated with completing all immigration inspections on board. These statutes provided that this transfer would not be considered "a landing" for immigration law purposes. *See* Act of Feb. 5, 1917, ch. 29, § 15, 39 Stat. 874, 885; Act of Feb. 20, 1907, ch. 1134, § 16, 34 Stat. 898, 903; Act of Mar. 3, 1891, ch. 551, § 8, 26 Stat. 1084, 1085-86. The "landing" provisions represented a pragmatic legislative response to the complexities of administering the nation's immigration laws during the early decades of federal immigration regulation. They helped shield shipping carriers from criminal liability for permitting noncitizens to disembark at the request of immigration officers, in contrast to their unquestioned liability for other, unauthorized "landings." *E.g.*, *Warren v. United States*, 58 F. 559, 561 (1st Cir. 1893) (describing sanctions on carriers). The "landing" provisions also gave immigration officials the flexibility to examine arriving noncitizens in their own special facilities like the buildings on Ellis Island, without relieving shipping companies of their responsibility for the costs and transportation of those subsequently deemed ineligible for admission. *See, e.g.*, *United States v. Holland-America Line*, 212 F. 116, 118-19 (2d Cir.) ("The legal fiction that the immigrants were not landed until they had been admitted . . . . only negatived any presumption that, because of actual landing, they had been admitted or that the defendant's obligation to return them if ordered to be deported was at an end.") (discussing "landing" provision of the 1907 Act), *aff'd* 235 U.S. 686 (1914).

[11] For example, the *Mezei* Court cited *Kaplan v. Tod*, 267 U.S. 228 (1925), which had held that a noncitizen could still be excluded despite being temporarily released into the country as a minor nine years earlier. *Id.* at 230 (noncitizen never "dwelt" in United States within meaning of naturalization statute based on prior physical presence); *see also Nishimura Ekiu*, 142 U.S. at 661-62 (noncitizen's transfer to shore pending determination of eligibility for admission "left her in the same position, so far as regarded her right to land in the United States, as if she had never been removed from the steam-ship," and did not alter power of government to exclude her as a person likely to become a public charge). Similarly, the Court subsequently determined that temporary parole into the United States does not entitle a noncitizen to seek the statutory benefit of withholding of deportation. *See Leng May Ma*, 357 U.S. at 188-89. None of these cases addressed the constitutional ramifications of the

these authorities to support the far more expansive proposition that the power to regulate immigration also included the power to detain a noncitizen indefinitely if he was found inadmissible, or otherwise to define completely the constitutional rights of such persons.

Indeed, in upholding the petitioner's indefinite administrative detention, *Mezei* failed to take into account basic principles governing the fundamental rights of noncitizens. It had already long been established that the Fourteenth Amendment's protections "are universal in their application, to all persons within the territorial jurisdiction" of the United States "without regard to any differences of . . . nationality." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).[12] It was similarly well established that the government's authority to regulate immigration did not authorize executive imprisonment of unlawful entrants. *Wong Wing v. United States*, 163 U.S. 228 (1896). In *Wong Wing*, this Court had declared unconstitutional a provision of an immigration statute imposing punishment of up to one year's hard labor on noncitizens "not lawfully entitled to be or remain in the United States." Act of May 5, 1892, ch. 60, § 4, 27 Stat. 25.[13] Although recognizing that Congress enjoyed broad power to exclude and expel

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potentially lifelong confinement of a noncitizen denied admission, a situation that, even under the government's view, would have posed distinct questions. *See, e.g.*, Brief for the Appellee, at 13, *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892) (No. 1393) ("[Ekiu] may at any moment free herself if she will return to the country of her sovereign, or will leave the United States. She is *withheld from coming in*.") (emphasis added).

[12] The issue of the Constitution's territorial scope was not presented in *Yick Wo*. However, in support of its equal protection analysis, the *Yick Wo* Court cited *Chy Lung v. Freeman*, 92 U.S. 275 (1875), a case reversing the exclusion of a noncitizen situated on a boat in the harbor outside San Francisco. *Yick Wo*, 118 U.S. at 374.

[13] The statute was formally entitled "An act to prohibit the coming of Chinese persons into the United States."

"undesirable aliens" and to impose "temporary confinement" to carry out this purpose, *Wong Wing* 163 U.S. at 235, the Court held that the Constitution limited the authority of Congress "to declare unlawful residence within this country to be an infamous crime, punishable by deprivation of liberty and property." *Id.* at 237. The specific facts of *Wong Wing* involved deportation, but the elementary principles of due process described by the Court encompassed exclusion as well. *Id.* at 235 ("The question now presented is whether congress can promote its policy [embodied in the Chinese exclusion acts] by adding to its provisions for their *exclusion* and expulsion punishment by imprisonment at hard labor.") (emphasis added); *see also id.* (contrasting temporary detention pending "[p]roceedings *to exclude or expel*" with unlawful sanction of imprisonment imposed on Wong Wing) (emphasis added). Thus, a noncitizen's violation of the immigration laws, subjecting him to removal from the country, did not deny him that most basic due process right against unlawful imprisonment. *Id.* at 237-38.

Consistent with these fundamental norms, courts before *Mezei* had typically limited the length of a noncitizen's detention pending exclusion from the United States. *See, e.g.*, *Staniszewski v. Watkins*, 80 F. Supp. 132, 135 (S.D.N.Y. 1948) (ordering release of noncitizen seaman detained at Ellis Island for almost seven months); *In re Krajcirovic*, 87 F. Supp. 379, 382 (D. Mass. 1949) (limiting immigration detention of noncitizen stowaway seized at the border to two months from date of court's decision; stating that "wherever the Constitution of the United States is applicable, and that includes ports of entry, an alien as well as a citizen is guaranteed that he will not be deprived of his liberty without due process of law"); *see also United States ex rel. Chu Leung v. Shaughnessy*, 88 F. Supp. 91, 92 (S.D.N.Y. 1950) (suggesting reasonable limit on time noncitizen may be detained even where exclusion not possible to effectuate); *Petition of Brooks*, 5 F.2d 238, 239 (D. Mass. 1925) (power to exclude

and deport does not include power to detain indefinitely); *cf. Tod v. Waldman*, 266 U.S. 113, 120-21 (1924) (ordering noncitizens' discharge from detention if administrative appeal of denial of admission is not "grant[ed] and hear[d]" within thirty days after issuance of Court's mandate).[14]

In sum, before 1953, courts not only applied the basic principles of due process to the procedures used to determine the admissibility of entering noncitizens, but also limited the length of time a noncitizen could be detained pending removal from the country. *Mezei*'s dictum to the contrary broke faith with this tradition and with the cases that established and affirmed it.

II. THIS COURT'S SUBSEQUENT DECISIONS HAVE ERODED *MEZEI* AND CONFIRMED ITS PLACE AS AN ANOMALY IN THIS COURT'S DUE PROCESS JURISPRUDENCE

While *Mezei* eschewed contemporary notions of due process when decided, it is even more anomalous today, given this Court's subsequent due process jurisprudence. Since *Mezei*, this Court has developed a more sophisticated and rigorous

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[14] Courts had similarly limited the period of detention pending deportation. *See, e.g., Wolck v. Weedin*, 58 F.2d 928, 930-31 (9th Cir. 1932) (ordering noncitizen's release if government could not effect his deportation within thirty days); *Caranica v. Nagle*, 28 F.2d 955, 957 (9th Cir. 1928) (implying existence of constitutional limitations on length of detention pending deportation; rejecting that period of two months was unconstitutional); *United States ex rel. Ross v. Wallis*, 279 F. 401, 403-04 (2d Cir. 1922) (noncitizen could not be detained more than four months if executive could not effect his deportation); *United States ex rel. Janavaris v. Nicolls*, 47 F. Supp. 201, 203-04 (D. Mass. 1942) (ordering release of seaman held for five months because deportation could not be effected in the foreseeable future); *Ex parte Perkov*, 45 F. Supp. 864, 867 (D. Cal. 1942) ("An alien taken into custody cannot be held indefinitely."); *cf. Moraitis v. Delany*, 46 F. Supp. 425, 432 (D. Md. 1942) (detention for longer than four months, including up to one year, was reasonable during wartime).

understanding of the relationship between regulatory and criminal sanctions that recognizes that the former can, in fact, be punitive. The Court's substantive due process jurisprudence also recognizes that an individual may be subjected to regulatory detention only in narrow circumstances under a carefully drawn scheme. And, further eroding *Mezei*'s rationale, this Court's procedural due process jurisprudence has grown and flourished through the development of a sensitive balancing test which acknowledges that the nature of constitutionally required procedures varies depending on the strength of the individual and governmental interests at stake, as well as the value of additional safeguards in producing more accurate results. These developments provide further reason to reject the interpretation of *Mezei* offered by the government.

A. This Court's Substantive Due Process Jurisprudence Has Eroded the Foundations on which *Mezei* Purported to Rest

Since *Mezei*, this Court has repeatedly emphasized that the core purpose of the Due Process Clause is to protect against unlawful detention, whatever the context. *See, e.g.*, *Zadvydas*, 533 U.S. at 690 ("Freedom from imprisonment—from government custody, detention or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects."); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."); *see also United States v. Salerno*, 481 U.S. 739, 755 (1987) ("In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.").

This Court has also developed a more carefully calibrated framework to assess the constitutional implications of regulatory detention in particular. At the time *Mezei* was decided, the Court lacked a test that could make the necessary

distinctions between regulatory and punitive sanctions. Charles D. Weisselberg, "The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei," 143 *U. Pa. L. Rev.* 933, 991-92 (1995). Thus, only more traditional "criminal" sanctions, such as imprisonment for hard labor, *see Wong Wing*, *supra*, would have seemed punitive to the justices on the *Mezei* Court, who viewed that case through the prism of proper procedures without considering how indefinite detention itself could violate due process. *Compare Mezei*, 345 U.S. at 207 ("The issue is whether the Attorney General's *continued exclusion of respondent without a hearing* amounts to an unlawful detention.") (emphasis added), *with Zadvydas*, 533 U.S. at 690-92 (indefinite detention under 8 U.S.C. § 1231(a)(6) "would raise a serious constitutional problem" in light of last three decades' of due process jurisprudence). The principle that all noncitizens are protected from unlawful confinement by the Due Process Clause has not changed since *Wong Wing*; it is only this Court's understanding of what makes that confinement unlawful that has evolved.

Increasingly sensitive to the dangers posed by regulatory detention, this Court has imposed temporal limits on that detention, which may last only for as long as the stated purpose of the commitment remains. *See, e.g.*, *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) ("[T]he nature and duration of commitment must bear some reasonable relation to the purpose for which the individual is committed."). In *Jackson*, the Court held that criminal defendants may not be committed to custody as incompetent to stand trial for more than the period reasonably necessary to determine whether they will become competent in the foreseeable future. *Id.*; *see also Kansas v. Hendricks*, 521 U.S. 346, 363-64 (1997) (sexually violent predators committed because their mental abnormality makes them a threat to others may be incapacitated only for as long as that stated purpose remains); *Reno v. Flores*, 507 U.S. 292, 314 (1993) (upholding INS

policy of maintaining custody of noncitizen juveniles pending deportation proceedings where "period of custody [was] inherently limited by the pending deportation hearing" and was expected to last "an average of only 30 days"). And, in upholding the pretrial detention of a narrow class of individuals in *Salerno*, *supra*, this Court emphasized the "stringent time limitations" on that detention. 481 U.S. at 747; *see also Schall v. Martin*, 467 U.S. 253, 269 (1984) (pretrial detention of alleged juvenile delinquents "strictly limited in time").

At the same time, this Court has required that regulatory detention be limited to narrow classes of individuals. In *Foucha*, *supra*, it declared unconstitutional the continued detention of a person acquitted by reason of insanity under a regime that was neither "sharply focused" nor "carefully limited." 504 U.S. at 81. In contrast, the bail reform statute upheld in *Salerno* "carefully limit[ed]" pretrial detention to "the most serious of crimes," 481 U.S. at 747, and the Court underscored that the government bore the burden of proof in "a full-blown adversary hearing" to demonstrate by "clear and convincing evidence" that an individual fell within that narrow class. *Id.* at 750. Similarly, the civil commitment scheme upheld in *Hendricks*, *supra*, strictly limited confinement to those with "a volitional impairment rendering them dangerous beyond their control" and required the government to demonstrate beyond a reasonable doubt that a particular individual fell within that narrowly defined category. 521 U.S. at 352, 358. Thus, the Court has substantially restricted the availability and duration of regulatory confinement in the years since it decided *Mezei*.

In *Zadvydas*, this Court established that its substantive due process jurisprudence provided the appropriate framework for evaluating the administrative detention of noncitizens pending removal from the United States. It concluded that a noncitizen's right to be present in the United States under the immigration statutes was distinct, as a matter of due process, from his right to be free of indefinite administrative detention.

The government thus cannot contend today, as it did in *Mezei*, that a noncitizen's detention, no matter how long, is lawful simply because it "'is itself the effectuation of the exclusion order.'" *Mezei*, 345 U.S. at 221 (Jackson, J., dissenting) (quoting government's argument). As the *Zadvydas* Court emphasized, not only must preventative detention based on dangerousness be limited to "specially dangerous individuals" but, when such detention is of potentially indefinite duration, it must be accompanied "by some other special circumstance, such as mental illness, that helps to create the danger." 533 U.S. at 690-91; *see also Hendricks*, 521 U.S. at 357 (potentially indefinite commitment requires proof not only of "a mere predisposition to violence" but also "evidence of past sexually violent behavior and a present mental condition that creates a likelihood of such conduct in the future if the person is not incapacitated").[15] Under the principles of *Zadvydas*

[15] The Court further stressed that, even when these rare conditions are satisfied by a narrowly drawn detention scheme, the government must also provide "strong procedural protections." *Zadvydas*, 533 U.S. at 690-91. Such protections are gravely lacking under the current administrative detention scheme. For example, the regulations governing the availability of supervised release to petitioner and other Mariel Cubans do not provide for: counsel at the government's expense; the right to call or examine witnesses; the right to examine the evidence considered by the government; an adversarial process; or placement of the burden of proof on the government. 8 C.F.R. § 212.12(d) (2001). Nor do they provide for a decision by an impartial adjudicator. *Id.* § 212(b)-(d); *see also St. John v. McElory*, 917 F. Supp. 243, 251 (S.D.N.Y. 1996) (INS officials not impartial decisionmakers as to noncitizens' detention). The current detention scheme also fails to provide for judicial review, raising the same serious constitutional question a substantially similar administrative scheme did in *Zadvydas*. *See* 533 U.S. at 692 ("[T]he Constitution may well preclude granting 'an administrative body the unreviewable authority to make determinations implicating fundamental rights.'") (quoting *Superintendent, Mass. Correctional Institute at Walpole v. Hill*, 472 U.S. 445, 450 (1985)); *see also id.* ("'[U]nder certain circumstances, the constitutional requirement of due process is a requirement of judicial

and the Court's post-*Mezei* substantive due process jurisprudence, the determination that a noncitizen is "inadmissible" under the immigration statutes does not remove his indefinite administrative confinement—in a federal prison on U.S. soil—from the fundamental protections of the Due Process Clause.[16] Accordingly, petitioner's detention raises precisely

process.'") (quoting *Crowell v. Benson*, 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting)).

[16] *Mezei*, as interpreted by the government, is also at odds with international human rights law prohibiting arbitrary detention. *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810 (1948), art. 9 ("[n]o one shall be subjected to arbitrary arrest, detention or exile"); Article 9 of the International Covenant on Civil and Political Rights ("ICCPR"), *adopted* Dec. 19, 1966, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *ratified by* the United States in 1992. Moreover, the Human Rights Committee, established to monitor compliance with the ICCPR, has interpreted "arbitrariness" as not to be equated exclusively with "against the law"; rather, it must be interpreted more broadly to include elements of "inappropriateness, justice, lack of predictability, or lack of due process." *Womah Mukong v. Cameroon*, Human Rights Committee, Communication No. 458/1991, CCPR/C/51/D/458/1991 at ¶ 9.8 (1994); *see also Ann Maria Garcia Lanza de Netto v. Uruguay*, Communication No. 8/1977, U.N. Doc. CCPR/C/OP/1 at ¶¶ 14-15 (1984) (finding violation of Article 9(1) of the ICCPR where two individuals were detained for several months after their sentences of imprisonment had been fully served). The European Court of Human Rights has applied similar principles to limit the length of detention. *See, e.g., Quinn v. France*, 21 E.H.R.R. 529 (1996) (detention pending extradition cannot exceed a reasonable time; finding 18 months' detention to violate European Convention for the Protection of Human Rights and Fundamental Norms and its prohibition against arbitrary detention). The United States has been specifically criticized by the Human Rights Committee for its treatment of excludable noncitizens. *See* Concluding Observations of the Human Rights Committee: United States of America 3/10/1995, U.N. Doc. CCPR/C/79/Add.50A/50/40 at ¶ 283 (1995) ("[The] Committee is concerned that excludable aliens are dealt with by lower standards of due process than other aliens and, in particular, that those who cannot be deported or extradited may be held in detention indefinitely.").

the same "serious constitutional problem" as did the petitioners' detention in *Zadvydas*.[17] It should likewise be prohibited.

B. This Court's Subsequent Procedural Due Process Jurisprudence Has Similarly Undermined *Mezei*.

Procedural due process "is a principle basic to our society." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *see also Malinski v. New York*, 324 U.S. 401, 413-14 (1945) (Frankfurter, J., concurring) ("The safeguards of 'due process of law' . . . summarize the history of freedom of English-speaking peoples running back to Magna Carta and reflected in the constitutional development of our people."). The Due Process Clause significantly limits the power of the government not only in criminal trials but in all instances in which an individual may be deprived of his liberty. *See, e.g., Addington v. Texas*, 441 U.S. 418, 425 (1979) (civil commitment); *In re Gault*, 387 U.S. 1, 31-32 (1967) (juvenile delinquency); *In re Oliver*, 333 U.S. 257, 274-75 (1948) (contempt of court); *see also Gagnon v. Scarpelli*, 411 U.S. 778, 781-82 (1973) (revocation of probation); *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972) (revocation of parole).

[17] This Court's more recent decision in *Demore v. Kim*, 538 U.S. 510, 123 S. Ct. 1708 (2003), provides further support for petitioner's due process claim. In upholding the mandatory detention of criminal noncitizens pending removal proceedings, *Kim* distinguished *Zadvydas* on two principal grounds, both of which are equally pertinent here. First, as in *Zadvydas*, removal is "'no longer practically obtainable,'" and thus petitioner's detention no longer "serve[s] its purported immigration purpose." *Kim*, 123 S. Ct. at 1719 (quoting *Zadvydas*, 533 U.S. at 690). Second, and again as in *Zadvydas*, the detention is "'indefinite'" and "'potentially permanent.'" *Id.* at 1720 (quoting *Zadvydas*, 533 U.S. at 690-91); *see also Carlson v. Landon*, 342 U.S. 524, 546 (1952) (distinguishing unique "problem" caused by an "unusual delay" in deportation hearings in upholding policy denying bail to certain noncitizens pending deportation proceedings).

However, because this Court has exercised great care in recent decades to accommodate important government interests when determining what procedures are due in a given situation, a decision confirming that the detention of inadmissible noncitizens like petitioner are within the protections of the Due Process Clause would not threaten those interests.

At least since its 1976 decision in *Eldridge*, *supra*, the Court has made clear that due process is a flexible concept and that courts must consider the government's interest in avoiding burdensome procedures, as well as the value of additional safeguards in producing an accurate result. *See, e.g., Gilbert v. Homar*, 520 U.S. 924, 932-33 (1997); *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 852 n.59 (1977); *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 15-16 (1979); *Addington*, 441 U.S. at 425; *see also* Martin, *supra*, at 167 ("The Supreme Court's approach to due process has undergone a virtual revolution since [*Knauff* and *Mezei*]."). Because the Due Process Clause requires a balancing test that accommodates governmental interests when determining whether particular procedures are needed, *Eldridge*, 424 U.S. at 335, courts can today consider and, when appropriate, defer to the unique national security interests that may arise in given situations during the course of the government's administration of the nation's immigration laws. *Cf. Mezei*, 345 U.S. at 214 (noting that Mezei "simply left the United States and remained behind the Iron Curtain for 19 months" without seeking security clearance or documentation before his departure).

This Court has applied these principles in the immigration context even as to admission. Specifically, in *Landon v. Plasencia*, *supra*, the Court applied the Due Process Clause to a returning resident—precisely the type of noncitizen to whom *Mezei* refused any due process—subject to exclusion

for illegally smuggling other noncitizens into the country.[18] Due process, the Court concluded, did not turn on whether the proceedings were classified as "exclusion" or "deportation"—by statute, the admissibility of a returning resident still had to be determined in an exclusion proceeding, 459 U.S. at 28—but rather on other factors, such as the person's former presence in the United States and ties to the community, as well as the government's interest in efficient procedures. *Id.* at 32-33. *Plasencia* expressly narrowed *Mezei* with respect to a noncitizen's right to admission, stating that "[*Mezei*] did not suggest that no returning resident alien has a right to due process," but that Mezei himself, based on his extended departure, had no such right with respect to his admission upon return to the United States. *Id.* at 33-34. Recognizing instead that Plasencia possessed a "weighty" liberty interest in remaining in the United States even though she was still considered to be at the border and subject to exclusion proceedings under the immigration statutes, the Court determined that the three-part *Eldridge* balancing test should be applied on remand to determine precisely what process she was due. *Id.* at 34-37. This test thus provides a more flexible and yet precise framework by which the judiciary may continue to fulfill its traditional role with respect to the

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[18] Prior to *Plasencia*, this Court had avoided the rigid distinction between deportation and exclusion suggested by *Knauff* and *Mezei* through statutory interpretation. *See Rosenberg v. Fleuti*, 374 U.S. 449, 461 (1963) (narrowly construing "entry" to exclude "innocent, casual, and brief" trip abroad by petitioner, thus not subjecting him to exclusion, contrary to the government's assertions); *see also Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953) ("assimilat[ing] petitioner's status to that of an alien continuously residing and physically present in the United States" in case of noncitizen seaman on American merchant vessel excluded without a hearing). While the holding in *Chew* was statutory—that the administrative regulations permitting exclusion without a hearing on national security grounds did not apply to his particular case—*Plasencia* subsequently referred to it as a "rationale . . . of constitutional law." 459 U.S. at 31.

regulation of the nation's borders—a "limited" but important one, ensuring "the procedures meet the essential standard of fairness" in light of "the particular circumstances." *Id.* at 34-35; *see also Zadvydas*, 533 U.S. at 694 (Due Process Clause applies to all noncitizens subject to a final order of deportation, "though the nature of that protection may vary depending upon the status and circumstance") (citing *Plasencia*, 459 U.S. at 32-34).

In sum, the Court's post-*Mezei* jurisprudence makes clear that the government's sweeping interpretation of *Mezei* is not only wrong but unnecessary.[19] Acknowledging the traditional liberty interest in avoiding detention, particularly indefinite detention pending removal based on inadmissibility, can, under the flexible test that has evolved, co-exist with the government's interest in national security. Quite simply, *Mezei* is, today, a dangerous anachronism.

III. *MEZEI* SHOULD BE LIMITED TO ITS PARTICULAR FACTUAL AND HISTORICAL CONTEXT AND NOT EXPANDED TO ENCOMPASS PETITIONER'S INDEFINITE ADMINISTRATIVE DETENTION

This Court need not, however, overrule *Mezei* to determine that petitioner's continued detention under 8 U.S.C. § 1231(a)(6) "would raise a serious constitutional problem." *Zadvydas*, 533 U.S. at 690. *Mezei* should instead be interpreted in light of its particular factual and historical context; thus understood, it does not yield the unjustifiably

[19] Moreover, from the perspective of enforcement of the immigration laws, interpreting *Knauff* and *Mezei* broadly to deny any constitutional rights to noncitizens at the border is counterproductive, foreclosing the gradual evolution of due process protections and requiring courts confronted with "outrageous" government conduct "to leap in with both feet, demanding costly and intrusive procedures that make control of the borders and deportation of aliens considerably more difficult." Aleinikoff, *supra*, at 259.

sweeping statement of constitutional law which the government now proposes.[20]

As in *Knauff*, the Court in *Mezei* repeatedly emphasized that its decision was authorized by national emergency provisions and animated by national security considerations. Specifically, Mezei's exclusion was grounded on wartime statutes permitting the President to impose additional restrictions on the entry and departure of noncitizens from the country "'[w]hen the United States is at war or during the existence of the national emergency.'" *Mezei*, 345 U.S. at 210-11 (quoting Act of May 22, 1918, c.81, § 1, 40 Stat. 559, as amended by Act of June 21, 1941, c.1, § 1, 55 Stat. 252); *see also Knauff*, 338 U.S. at 540-42 (same); Brief for the Respondent in Opposition, at 11 *United States ex rel. Knauff*

[20] Although *amicus* urges the Court to limit *Mezei* to its facts, overruling *Mezei* would be consistent with the principles of *stare decisis*. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 63 (1996) (*stare decisis* is a "principle of policy," not an "inexorable command"); *see also Agostini v. Felton*, 521 U.S. 203, 235-36 (1997). By overruling *Mezei*, this Court would restore its jurisprudence on a previously long-established point of constitutional law. *See generally*, Hart, *supra*, at 1390-91; *Yamataya* 189 U.S. at 100; *cf. Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 233-34 (1995). This step would also be consistent with the Court's post-*Mezei* recognition that administrative detention implicates the Due Process Clause, *supra*, at II.A, and its relaxation of *Mezei*'s bright-line "entry" distinction in *Plasencia* and *Fleuti*, *supra*, at II.B. Additionally, this Court decided *Mezei* by the narrowest of margins over spirited dissents that challenged the basic premises of the majority; like the decisions in *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989), both of which this Court overruled in *Payne v. Tennessee*, 501 U.S. 808 (1992). Overruling *Mezei* would also not harm any entity's reliance interests. *See, e.g., Adarand*, 515 U.S. at 233; *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 856 (1992). And *Mezei* is fundamentally distinct from decisions such as *Roe v. Wade* and *Miranda v. Arizona*, which this Court has declined to reconsider in part because they, unlike *Mezei*, have become incorporated into the fabric of society. *Dickerson v. United States*, 530 U.S. 428, 443 (2000); *Casey*, 505 U.S. at 854.

v. Shaughnessy, 338 U.S. 537 (1950) (No. 54) ("The United States still is at war.") Pursuant to this authority, the Attorney General, acting for the President, could not only exclude noncitizens whose "entry would be prejudicial to the interest of the United States," but could do so without a hearing in the "special case" where that exclusion was based on "information of a confidential nature, the disclosure of which would [itself] be prejudicial to the public interest." *Mezei*, 345 U.S. at 210-11 & nn. 7 & 8 (internal quotation marks and citations omitted).

In denying Mezei relief, the Court expressly distinguished a noncitizen's temporary detention pending "expeditious consummation of deportation proceedings" from "[a]n exclusion proceeding *grounded on danger to the national security*," 345 U.S. at 215-16 (emphasis added), noting that "to admit an alien barred from entry *on security grounds* nullifies the very purpose of the exclusion proceeding." *Id.* at 216 (emphasis added); *see also id.* at 217 (Black, J., dissenting) (detention based on Attorney General's assertion that it "would be dangerous to the Nation's security to let Mezei go home even temporarily on bail"). The Court's reliance not only on *Knauff*,[21] but also on *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) (deportation of former Communist Party members under Internal Security Act), and *Ludecke*, *supra* (deportation of "enemy alien"), further underscores that *Mezei* turned on the special facts and circumstances of national security cases rather than some sweeping and inflexible principle meant to govern the prolonged detention of all

[21] The *Knauff* Court emphasized similar concerns. *E.g.*, 338 U.S. at 544 (denial of hearing because "disclosure of information on which [Attorney General] based . . . opinion [to exclude petitioner] would itself endanger the public security"); *id.* at 546 (no power to retry Attorney General's determination to exclude petitioner without a hearing "during the [present] national emergency").

unadmitted noncitizens. Indeed, the government had expressly argued that because the decision regarding Mezei specifically involved national security interests, his case presented an exception to the general rule of releasing noncitizens from unreasonable detention pending their deportation or exclusion. Brief for the Petitioner, at 32, *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) (No. 139) (invoking *Korematsu v. United States*, 323 U.S. 214, 219 (1944), to argue, in light of "the present period of national peril," that "hardships" such as Mezei's detention, "are part of war, and war is an aggregation of hardships"); *id.* at 29 (comparing Mezei's confinement to "an alien enemy interned during time of war"); *id.* (justifying Mezei's continued detention on ground that his exclusion was "for reasons of internal security"); *id.* at 29-30 (continued exclusion and detention of Mezei may continue until "his entry no longer will imperil the national safety" or "until the conclusion of the [national] emergency"); *see also Mezei v. Shaughnessy*, 195 F.2d 964, 968 (2d Cir. 1952) (summarizing government's argument to court of appeals); *cf. Jay v. Boyd*, 351 U.S. 345, 358-59 (1956) (relying on *Mezei* and *Knauff* primarily as national security cases, rather than exclusion cases, in dismissing challenge to government's use of confidential information in deportation proceeding).[22]

The government would now stretch *Mezei*'s narrow holding to reach the indefinite detention of every inadmissible noncitizen, including those, like petitioner, who have lived here for many years even if they never were formally admitted. It is simply not true, however, that each and every one "creates an obvious gap in border security," or that the

[22] The Solicitor General has not raised any specific national security (or even dangerousness) concerns with respect to the petitioner. Indeed, the government not only determined in September 2003 that petitioner is currently a candidate for release, but it first released petitioner on parole shortly after he arrived in the United States in 1980.

supervised release into the community of such individuals would necessarily expose an "unprotected spot in the Nation's armor." *See* Brief for the Respondent on Petition for Writ of Certiorari at 14-15.

Today, *Zadvydas* embodies the fundamental values consistent with this nation's long tradition of due process and the rule of law—that an individual's indefinite administrative detention does not become lawful because it purportedly occurs pursuant to the government's enforcement of the immigration statutes. *Mezei*, by contrast, was an anomaly when it was decided, and, at least as interpreted as broadly as the government proposes, has been rendered obsolete by this Court's last half-century of due process jurisprudence. At most, *Mezei* should be understood to stand for the proposition that the government may exclude and continue to detain an inadmissible noncitizen in carefully limited circumstances, based on the assertion of a specific national security interest and in accordance with procedures required by the Due Process Clause. *Cf. Zadvydas*, 533 U.S. at 696 ("[We do not] consider terrorism or other special circumstances where special arguments might be made for forms of preventative detention and for heightened deference to the judgments of the political branches with respect to matters of national security."). This Court should not transform *Mezei*'s dictum, as the government urges, into a sweeping principle of constitutional law that places an individual's potentially lifelong administrative detention beyond all guarantees of due process simply because he has been found "inadmissible" for immigration purposes.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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